STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Owens, P.J., O'Connell, and Talbot, JJ

* * * *

THE PEOPLE OF THE
STATE OF MICHIGAN,
Plaitniff-Appellee,

Supreme Court No. 141837

vs

ANGEL MORANO, JR.
Defendant-Appellant.

COA No. 294840
Lower Court No. 09-33445-FH

BRIEF OF PLAINTIFF-APPELLEE

* * * *

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Plaintiff-Appellee accepts that this matter is properly before the Supreme Court.

COUNTERSTATEMENT OF QUESTIONS INVOLVED

ARGUMENT I

WHETHER A PERSON PRESENT IN HIS OR HER OWN HOME CAN LAWFULLY RESIST A POLICE OFFICER WHO UNLAWFULLY AND FORCIBLY ENTERS THE HOME WITHOUT VIOLATING MCL 750.81d?

Plaintiff-Appellee answers, "No".

Defendant–Appellant answers, "Yes".

Court of Appeals answered, "No".

Trial Court answered, "No".

ARGUMENT II

IF NOT, WHETHER, SO INTERPRETED MCL 750.81d IS UNCONSITUTIONAL

Plaintiff–Appellee answers, "No".

Defendant – Appellant answers, "Yes".

Court of Appeals answered, "No".

Trial Court answered, "No".

ARGUMENT III

WHETHER A DEFENDANT PROSECUTED UNDER MCL 750.81d FOR RESISTING A POLICE OFFICER WHO UNLAWFULLY AND FORCIBLY ENTERS THE DEFENDANT'S HOME MAY CLAIM SELF-DEFENSE?

Plaintiff-Appellee answers, "No".

Defendant-Appellant answers, "Yes".

Court of Appeals answered, "No".

Trial Court answered, "Yes".

ARGUMENT IV

WHETHER A POLICE OFFICER WHO SMELLED BURNT OR BURNING MARIJUANA WHILE STANDING BY AN OPEN DOOR OF A HOUSE MAY ENTER THE HOME TO SECURE IT PENDING THE ISSUANCE OF A SEARCH WARRANT TO PREVENT THE IMMINENT DESTRUCTION OF EVIDENCE PURSUANT TO EXIGENT CIRCUMSTANCES PER IN RE FORFEITURE OF $176,598, 443 Mich 261 (1993)?

The Plaintiff-Appellee answers, "Yes".

The Defendant-Appellant answers, "No".

The Court of Appeals did not answer

The Circuit Court answered, "No".

CONCISE STATEMENT OF FACTS

Officer Hamberg of the Holland Police Department, along with Officer DeWys went to a home to try and locate a probation absconder. As they walked up the driveway, an individual informed them a large group of underage people were drinking in the house. (Appx 5a)

The police knocked on the doors and windows to have someone com to the door. Shining the flashlight into the basement window they could see people running and hiding. About 10 - 15 people were observed at that time. (Appx 6a) With the use of the flashlight, Hamberg saw a "large volume of alcohol bottles that looked to be empty in the basement. (Appx 7a)

Eventually, a Mandy McCarry came to the door. She informed the police she was the homeowner. The police explained to Ms. McCarry they were there to try and locate an individual on an outstanding warrant. They were having this discussion at the front door. (Appx 8a-9a)

The police also told Ms. McCarry they were advised underage drinking was going on in the house. Ms. McCarry agreed that underage people were drinking in the house. While standing at the front door, Hamberg "could smell a very strong odor of intoxicant coming from inside the house as well as an odor of burnt or burning marijuana". (Appx 9a-10a)

Hamberg then explained he would like to secure the house while a search warrant was obtained. Ms. McCarry told the officers she would not consent to the entry and they would need a search warrant. Hamberg then explained he intended to secure the house. (Appx 10a-11a)

At that time defendant appeared and told the officers "to get the fuck off his porch". Again Hamberg explained his intention to secure the house. Defendant then tried to slam the door closed. Hamberg put his shoulder into the door. Defendant then grabbed Hamberg, who then grabbed defendant. Officer DeWys then intervened. The three wrestled for a time and ended up on the lawn. Hamberg told DeWys to "Taser him", at which time defendant gave up. (Appx 11a-13a).

After arguments, the District Court stated in part: "...whether the officers are acting lawfully or unlawfully, there is no right to physically resist that assault - - or - - or to physically resist those officers, and I think that applies whether it is a - - whether the illegality - - and again, I'm not - - I'm not necessarily saying that the conduct was illegal under these circumstances, but assuming for the sake of argument that it was, I don't see any difference between an illegal seizure of a person, which prior case law has said is - - does not justify assaulting a police officer - - or resisting a police officer, any difference between that factual situation and physically resisting an illegal search of a residence, assuming that this was an illegal search or attempted search of the residence by keeping the door forced open." (Appx 54a).

ARGUMENT I

A PERSON PRESENT IN HIS HOME MAY NOT LAWFULLY RESIST A POLICE OFFICER WHO UNLAWFULLY AND FORCIBLY ENTERS THE HOME WITHOUT VIOLATING MCL 750.81d.

STANDARD OF APPELLATE REVIEW

The question of statutory interpretation is reviewed de novo. People v Perkins, 480 Mich 448, 451; 662 NW2d 727 (2003).

Statutory Construction

In interpreting statues, this Court follows established rules of statutory construction. Assuming that the Legislature has acted within it constitutional authority, the purpose of statutory construction is to discern and give effect to the intent of the Legislature. Potter v McLeary, 484 Mich 396, 411; 774 NW2d 1 (2009). The Court must interpret the language of a statute in a manner that is consistent with the legislative intent. Potter, 484 Mich at 410-411. In determing the legislative intent, the Court must first look to the actual language of the statute. Id at 410. As far as possible, effect should be given to every phrase, clause, and word in the statute. Sun Valley Foods Co v Ward, 460 Mich 230, 237; 596 NW2d 119 (1999). Moreover, the statutory language must be read and understood in its grammatical context. Herman v Berrien Co, 481 Mich 352, 366; 750 NW2d 570 (2008). When considering the correct interpretation, the statute must be read as a whole. Sun Valley, 460 Mich 237. Individual works and phrases, while important, should be read in the context of the entire legislative scheme. Herman, 481 Mich 366. In defining particular words within a statute, the court must consider both the plain meaning of the critical word or phrase and its placement and purpose in the statutory scheme. Id. People v Jackson, 487 Mich 783, 791; 790 NW2d 340 (2010).

Discussion

Defendant is charged with Resisting and Obstructing a Police Officer contrary to MCL 750.81d(1) and MCL 750.81d(2). The prior Resisting and Obstructing statute, MCL 750.479 stated in relevant part:

> "Any person who shall knowingly and willfully...obstruct, resist, oppose, assault, beat or wound...any person or persons authorized by law to maintain and preserve the peace, in their lawful acts, attempts and efforts to maintain, preserve and keep the peace shall be guilty of a misdemeanor..."

MCL 750.479 had been interpreted to provide that "one may use reasonable force as is necessary to prevent an illegal attachment and to resist an illegal arrest." People v Krum, 374 Mich 356, 361; 132 NW2d 69 (1965). The reason was because the legality of the arrest was an element of the charged offense. People v Rice, 192 Mich App 240, 243; 481 NW2d 10 (1991). Additionally, the reason behind this rule was the premise that an unlawful arrest acted as "nothing more than an assault and battery against which the person thought to be restrained may defend himself as he would against any other unlawful intrusion upon his person or liberty". People v Eisenberg, 72 Mich App 106, 111; 249 NW2d 313 (1976).

MCL 750.81d(1) was enacted by 2002 PA 266, which provides in pertinent part that "an individual who assaults, batters, wounds, resists, obstructs, oppose, or endanger a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony...". MCL 750.81d(2) contains the additional element that the individual cause a bodily injury.

In the case of People v Ventura, 262 Mich App 370; 686 NW2d 748 (2004), defendant was charged with Resisting and Obstruction a Police Officer contrary to MCL 750.81d and also being a Minor in Possession of Alcohol (MIP), contrary to MCL 436. 1703(1)(a). The incident

arose when an officer went to defendant's residence to investigate a stolen gun. In speaking to defendant, the officer noticed the odor of alcohol and informed defendant he was under arrest. The office grabbed defendant who broke free. Ultimately the officer, with the help of others, was able to handcuff the defendant.

Defendant moved to dismiss the charge contending the arrest was illegal since alcohol in one's system was insufficient to support an MIP pursuant to People v Rutledge, 250 Mich App 1; 645 NW2d 332 92002). The District Court agreed finding the arrest illegal and dismissed the charges. The prosecutor appealed arguing that MCL 750.81d does not have an element that the arrest be legal. The Court of Appeals agreed saying "The language of MCL 750.81d is abundantly clear and states only that an individual who resists a person the individual knows or has reason to know is performing his duties is guilty of a felony. MCL 750.81d" Id. 376.

Additionally, the Ventura court stated:

> "Assaulting, resisting, or obstructing an officer while he is performing his duty must be avoided for the safety of all society, regardless of the legality of the arrest. It is the immediate harm that can be attendant to an arrest when a subject engages in assaultive, resistant, or obstructive behavior that the Legislature seeks to eradicate. Solid mechanisms are in place to guarantee the safety of those arrested and to correct any injustices that may result from an illegal arrest. The statute at issue, MCL 750.81d, now serves as another mechanism to reduce the likelihood and magnitude of the potential dangers inherent in an arrest situation, thereby dually protecting both the general public and its police officers." Id. 377.

Since the decision in Ventura, supra, there have been numerous Court of Appeals decisions that have agreed with the holding in Ventura, supra that MCL 750.81d no longer permits an individual to use force against a police officer in performing his or her duties.

In the unpublished case of Haines v Lamontaine, CA No. 263935, decided February 23, 2006) (Appx 58a) the case arose when the police responded to a phone call reporting that plaintiff was assaulting his girlfriend. When the police arrived the plaintiff permitted the police to search the public area of the campground office, but would not allow the police to search his living area. The police insisted and plaintiff blocked the door with his body. The police arrested plaintiff for obstructing the search and handcuffed him. Plaintiff claimed the arrest and search constituted intentional torts. The Court of Appeals affirmed the trial court's granting summary judgment to defendants saying in part:

> "...the obstruction statute makes it illegal to obstruct an officer even if the officer is taking technically unlawful action, if the actions are done in the performance of the officer's official duties. See People v Ventura, 262 Mich App 370, 377; 686 NW2d 748 (2004); MCL 750.81d.
>
> Although plaintiff asserts that the officers demanded his permission, the record reflects that they first demanded entry, and plaintiff "refused" and stood in front of the door. This obstruction of the officers provided defendants with probable cause, and therefore justification, to arrest plaintiff for obstruction, MCL 750.81d, ..." (Appx 58a)

The Haines court noted the statute makes it "illegal to obstruct an officer even if the officer is taking technically unlawful action, or the actions are done in the performance of the officer's official duties". Even if the action of the officers in entering the home are technically unlawful, one may not obstruct an officer as long as that officer is performing his official duties. So, even if the entry into defendant's house by the officer was technically unlawful, defendant still could not obstruct the officer who was unquestionably performing his duties. The officer ultimately obtained a search warrant and pursuant to the search seized marijuana. So there can

be no dispute he was performing his duties.

As the Ventura court noted, the Legislature has determined the right to resist an unlawful arrest to be outmoded in our contemporary society and the Legislature made an obvious affirmative choice to modify the traditional common-law rule that a person may resist an unlawful arrest". Ventura, 376-377. Further the Ventura court noted:

> "Solid mechanisms are in place to guarantee the safety of those arrested and to correct any injustices that may result from an illegal arrest. The statute at issue, MCL 750.81d, now serves as another mechanism to reduce the likelihood and magnitude of the potential dangers inherent in an arrest situation, thereby dually protecting both the general public and its police officers." Ventura, 377.

The statute prohibits the assaulting, resisting, or obstructing a police officer who is performing his duties. There is no disputing that Officer Hamberg was performing his duties at the time, so defendant violated the statute when he grabbed onto Officer Hamberg in an attempt to forcibly eject Officer Hamberg from the porch.

ARGUMENT II

EVEN THOUGH AN INDIVIDUAL MAY NOT USE FORCE AGAINST A POLICE OFFICER WHO FORCIBLY ATTEMPTS TO ENTER THE HOME, THE STATUTE IS NOT UNCONSTITUTIONAL.

Standard of Appellate Review

Constitution issues on appeal are reviewed de novo. People v Gillam, 479 Mich 253, 260; 734 NW2d 585 (2007).

Discussion.

While discussing the situation with defendant, the police officer noted the smell of burning marijuana coming from inside the home. The officer informed the defendant he intended to secure the home to prevent the destruction of evidence while a search warrant was obtained. Defendant then closed the door to prevent entry by the officer(s). The officer stuck his foot inside the door jam so the door could not be closed and also put his shoulder against the door. It was at this time the defendant put his hands on the officer, pushing him away from the door. A scuffled ensued with the defendant ultimately being arrested for Resisting and Obstructing contrary to MCL 750.81d(1) and (2). Defendant asserts MCL 750.81d is unconstitutional because it violated the Fourth Amendment of the United States.

The Fourth Amendment of the Untied States constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." [US Const, Am IV.]

In Payton v New York, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980). The United

States Supreme Court held that the Fourth Amendment protected the police from entering a home without a warrant or consent for the purpose of making an arrest. Id. at 576. The Court summarized saying:

> "In terms that apply equally to seizures of property and to seizures of person, the Fourth Amendment has drawn a fine line at the entrance to the house. Absent exigent circumstances that threshold may not reasonably be crossed without a warrant." Id at 590.

Evidence seized in violation of the Fourth Amendment is subject to the exclusionary rule, or exclusion being used against the defendant. Mapp v Ohio, 367 US 643, 81 S Ct 1684 6 L Ed 2d 1081 (1961).

The exclusionary rule is judicially created. The primary purpose of the exclusionary rule is to deter future unlawful police conduct. As such, courts impose the exclusionary rule in criminal proceedings to deter police officers from making future illegal searches and seizures. People v $180,975 in United States Currency, 478 Mich 444, 451-452; 734 NW2d 489 (2007).

A young mother is walking down the sidewalk with her baby. As she walks past a house, a man runs out the front door and grabs the baby from her arms, and rushes back into the house. The mother starts screaming her baby has been kidnapped and brought into the house, pointing at the house.

At that moment, a police officer is walking across the street. He observes the baby being kidnapped and the baby brought into the house, plus he hears the mother screaming and crying. In response he runs across the street, up the steps and tries to force his way into the residence to rescue the baby. As he tries to enter the door, the perpetrator/homeowner is holding the door and verbally yelling at the officer to stay out of his house. However, the officer continues to push and

is able to get inside the residence. When he does, the perpetrator/homeowner and the officer wrestle until other officers come to the aid of the officer and are able to control and arrest the perpetrator/homeowner.

The perpetrator/homeowner among other charges is charged with Resisting and Obstructing a Police Officer contrary to MCL 750.81d. Based upon the above scenario everybody would agree the officer was merely performing his duties and the perpetrator/homeowner could be charged and convicted of Resisting and Obstructing a Police Officer. No court or individual for that matter would hold the Fourth Amendment insulated the individual from prosecution.

In the instant case, defendant asserts the Fourth Amendment is implicated because the actions of the officer amounted to an illegal entry and as such could use force to repel the offier from his home. However, at no time did he ever tell the officer he was acting to prevent an illegal entry. In fact, the legality of an event, whether it be an arrest, search and seizure, or charge is a matter of law that is determined in a court of law. There is no evidence the actions of defendant occurred because he perceived the actions of the police to be illegal. He is piggybacking this argument based upon the trial court's holding the actions of the officer amounted to an illegal entry.

The Fourth Amendment is simply not implicated in the issue whether MCL 750.81d is constitutional. As the Ventura court noted:

> "Assaulting, resisting, or obstruction an officer while he is performing his duty must be avoided for the safety of all society, regardless of the legality of the arrest. It is the immediate harm that can be attendant to an arrest when a subject engages in assaultive, resistant, or obstructive behavior that the Legislature seeks to eradicate. Solid mechanisms are in place to guarantee the

> safety of those arrested and to correct any injustices that may result from an illegal arrest. The statute at issue, MCL 750.81d, now serves as another mechanism to reduce the likelihood and magnitude of the potential dangers inherent in an arrest situation, thereby dually protecting both the general public and its police officers." Ventura, 377.

If the Fourth Amendment does not apply as to the issue of the constitutionality of the statute, defendant argues the statute is unconstitutionally vague. A statute may be unconstitutionally vague because (1) it is overbroad and impinges on First Amendment freedoms, (2) it fails to provide fair notice of the conduct proscribed, or (3) it is not indefinite that it confess unlimited and unstructed discretion on the trier of fact to determine when an offense has occurred. People v Hrlic, 277 Mich App 260, 263; 744 NW2d 221 (2007). When evaluating a vagueness challenge, the court must examine the entire text of the statute and give the words of the statute their ordinary meanings. Hrlic, 263.

Defendant characterizes his actions as merely defending his home from one who forcibly enters his home without a warrant, as if the lack of a warrant automatically makes the actions of the officer improper. But we know the fact of no warrant is not dispositive. The entire circumstances must be reviewed and if exigent circumstances exist; the entry is permitted even if there was no warrant. Payton, supra. So defendant cannot rely on the fact the officer did not have a warrant to support his claim the statute is unconstitutionally vague. More importantly, Ventura, supra, has been the law since 2004, and has been followed by every Court of Appeals decision since being reported. As previously noted in Haines, a 2006 case, the Court of Appeals noted "...the obstruction statute makes it illegal to obstruct an officer even if the officer is taking technical illegal action..." Technical illegal action would include an illegal entry. Defendant

was therefore properly on notice even though the entry into his home may be illegal, he could not assault or obstruct the officer and would be charged pursuant to MCL 750.81d.

In the case of People v Rasheen Keyon Brown, CA No. 270827, June 3, 2008 (Appx 62a) defendant argued the statute unconstitutional. The Court of Appeals disagreed saying:

> Defendant further argues, however, that as interpreted in Ventura the statute is unconstitutional because it violates his constitutional rights against unreasonable searches and seizures, and against self-incrimination. We disagree.
>
> As our Supreme Court explained in Phillips v Mirac, Inc, 470 Mich 415, 422-423; 685 NW 2d 174 (2004):
>
> > Statutes are presumed constitutional. We exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict. Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity. [Citations and internal quotations omitted.]
>
> Further, a statute is not unconstitutional merely because it is undesirable, unfair, or unjust, In re Juvenile Commitment Costs, 240 Mich App 420, 440; 613 NW2d 348 (2000), or because it might be improperly administered, People v Kirby, 440 Mich 485, 493; 487 NW2d 404 (1992). Such arguments should be addressed to the Legislature. Proctor v White Lake Twp Police Dep't, 248 Mich App 457, 462; 639 NW2d 332 (2001).
>
> Although defendant contends that MCL 750.81d(1) violates his protections under the Fourth Amendment, the statute does not authorize conduct prohibited by the Fourth Amendment. It merely prohibits an individual from resisting or obstructing a police officer in the performance of his duties. Further, contrary to what defendant argues, the statue does not foreclose challenges to the legality of a police officer's conduct in an appropriate forum. As this Court observed in Ventura, supra at 377, "[s]olid mechanisms

> are in place to guarantee the safety of those arrested, and, to correct any injustices that may result from an illegal arrest."

As the Court of Appeals noted in Rasheen Brown, the statute does not violate the Fourth Amendment nor is it unconstitutionally vague so defendant's argument must fail.

ARGUMENT III

THE DEFENDANT BEING PROSECUTED UNDER MCL 750.81d FOR RESISTING A POLICE OFFICER WHO UNLAWFULLY AND FORCIBLY ENTERS THE DEFENDANT'S HOME MAY NOT CLAIM SELF-DEFENSE.

Standard of Appellate Review

Whether common law affirmative defenses are available for a statutory crime and, if so, where the burden of proof lies are questions of law. The court reviews questions of law de novo. People v Dupree, 480 Mich 693, 702; 783 NW2d 399 (2010).

Discussion.

Defendant asserts that the common law of self-defense justifies his assault on police. "An affirmative defense admits the crime but seeks to excuse or justify its commission. It does not negate specific elements of the crime. An affirmative defense in effect concedes the facial criminality of the conduct and presents a claim of justification or excuse." Dupree at 704 (Citations omitted).

The elements of self-defense or defense of others are: 1) The defendant honestly and reasonably believed there was danger; 2) The danger amounted to serious bodily harm or death; 3) The defendant's actions at the time were reasonably necessary for self-defense or defense of others; and 4) The defendant was not the initial aggressor. People v Riddle, 467 Mich 116, 119; 120 n 8; 649 NW 30 (2002).

Self-defense then is a legal justification to present serious bodily harm or death to oneself or another. In this case, there was never any risk of serious physical harm to defendant or others. The police's intent was to secure the residence, an inanimate object, so the affirmative defense or self-defense is not appropriate in the instant case.

The defendant argues the affirmative defense of self-defense applies because it is his home and he has a right to defend his "home" from entry against his wishes. But such an argument defeats the purpose of the statute and legislative intent. In the case of People v Cash, 419 Mich 230; 351 NW2d 822 (1984) this court addressed the issue whether the criminal sexual conduct code intended to omit the defense of a reasonable mistake of age from its definition of third-degree criminal sexual conduct involving a 13-16 year old.

In holding that there is no reasonable mistake of age defense, the Supreme Court stated "we follow the legislative intention". The court went further on to say:

> "It is well established that the Legislature may, pursuant to its police powers, define criminal offenses without requiring proof of a specific criminal intent and so provide that the perpetrator proceed at this own peril regardless of his defense of ignorance or an honest mistake of fact." (citations omitted). Cash, pp 240-241.

Additionally, the Cash court stated "that the Legislature is 'presumed to know of and legislate in harmony with existing law.'" People v Harrison, 194 Mich 363, 369; 160 NW2d 623 (1910); Cash, p 241. When the Legislature enacted MCL 750.81 et seq, it was aware of MCL 750.579 and the defenses permitted by MCL 750.479. The Legislature chose to follow the modern rule that "assaulting, resisting, or obstructing an officer while he is performing his duty must be avoided for the safety of all society..." Ventura, p 377. This is a proper legislative intent and is such the defense of self-defense does not apply.

Lastly, based upon the above facts, defendant as well as Ms. McCarry were violating MCL 750.141a(2) by knowingly allowing persons at a social gathering to consume or possess an alcoholic beverage, a misdemeanor with a penalty of 30 days and/or $1,000.00. Because the social gathering was occurring when the officers were present, defendant could have been

arrested without a warrant because the misdemeanor was being committed in their presence contrary to MCL 764.15(1)(a). It matters not, the officer thought of the charge or had the state of mind to provide the legal justification. People v Arterberry, 431 Mich 381, 384; 429 NW2d 574 (1988). Defendant was committing a crime, could have been properly arrested, and therefore, any claim of self-defense is inapplicable.

ARGUMENT IV

THE POLICE COULD PROPERLY SECURE DEFENDANT'S HOME BECAUSE THERE WERE EXIGENT CIRCUMSTANCES TO PREVENT THE IMMINENT DESTRUCTION OF EVIDENCE.

Standard of Appellate Review

The court reviews de novo a Circuit Court's ultimate ruling on a motion to suppress. People v Davis, 250 Mich App 357, 362; 649 NW2d 94 (2002). Factual findings are reviewed for clean error. Id. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. People v Mullen, 282 Mich App 4, 22; 762 NW2d 170 (2008).

Discussion.

This case was initiated when the police went to defendant's home looking for another person. As they were walking up the driveway, an individual informed the police underage drinking was occurring at the residence. The police knocked on the door and window to try and get the homeowners to come to the door. They could hear lots of voices and shining the flashlight into the home saw people running around the basement, trying to hide, plus a number of alcohol bottles.

Eventually, Ms. McCarry opened the door. She was informed they were advised there was underage drinking going on in the house. She agreed that was occurring at the house. As Officer Hamberg was standing at the door talking to Ms. McCarry he could smell an odor of burning marijuana.

The police then asked her for consent to secure the home while a search warrant was obtained. She indicated she was not going to consent and requested a search warrant.

The police then explained they were going to secure the area at which time defendant told the police "to get the fuck off his porch". Again the police tried to explain they intended to secure the residence. Defendant then tried to slam the door. Officer Hamberg prevented it from being closed by putting his shoulder into the door. Defendant then grabbed Officer Hamberg pushing up against the door. Hamberg responded by grabbing defendant. Officer DeWys came to assist Officer Hamberg. The three ended up in the front yard and after defendant was advised he was going to be tased, defendant gave up and was arrested.

After the preliminary examination, defendant was bound over to Circuit Court on two counts of Resisting and Obstructing a Police Officer contrary to MCL 750.81d(1) and MCL 750.81d(2). At the Circuit Court, defendant filed a Motion to Quash, arguing he was improperly bound over because he was merely defending his home from an illegal entry. The Circuit Court after determining the police did not have exigent circumstances so any entry was illegal. It should be noted at no time did defendant ever testify to give his version of the events, or to ever testify he believed the officers were illegally attempting to enter his home and he needed to use force against the officers as self-defense for himself or others.

In the Order Granting Leave to Appeal, Justice Corrigan indicated:

> I concur with the Court's order granting leave to appeal. I also request that the parties brief whether the trial court erroneously concluded that the exigent circumstances exception to the warrant requirement did not apply where the police officer testified that he smelled burning or burnt marijuana while standing by the open doorway of the defendant's home and that the entry was necessary under the circumstances to prevent the imminent destruction of evidence. See generally In re Forfeiture of $176,598, 443 Mich 261 (1993).

The Fourth Amendment of the United States Constitution guarantees the right of the

people to be free from unreasonable searches and seizures. U.S. Const Am IV. The remedy for a violation is suppression of the unlawfully obtained evidence. Weeks v United States, 232 US 383; 34 S Ct 341; 58 L Ed 652 (1914).

One of the exceptions to the Fourth Amendment warrant requirement is the exigent circumstances exception. People v Toohey, 438 Mich 265, 271, n 4; 475 NW2d 16 (1991). This exception still requires reasonableness and probable cause. In re Forfeiture of $176,598, 443 Mich 261, 266; 505 NW2d 201 (1993).

In the case of In re Forfeiture of $176,598 the Supreme Court explained the exigent circumstances exception by saying:

> Pursuant to the exigent circumstances exception, we hold that the police may enter a dwelling without a warrant if the officers possess probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime. The police must further establish the existence of any actual emergency on the basis of specific and objective facts indicating that immediate action if necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect. If the police discovery evidence of a crime following the entry without a warrant, that evidence may be admissible. 443 Mich at 271.

In this case the officer testified he could smell an odor of burnt or burning marijuana. The odor of marijuana alone is enough to give rise to probable cause. People v Kazmierczak, 461 Mich 411, 424; 605 NW2d 667 (2000). So it was reasonable for the officer to believe marijuana was in the residence. With all the individuals in the home and speaking to Ms. McCarry and defendant about the marijuana, the exigent circumstances of preventing the imminent destruction of evidence would apply and it was therefore proper to enter the residence

to secure the area while a search warrant was obtained. In fact, a search warrant was obtained and in the words of the officer, a decent amount was recovered. So, the Circuit Court was in error when it concluded the officer did not have exigent circumstances to prevent the entry to secure the residence.

CONCLUSION

Defendant in this case was the aggressor, he initiated the contact with the police. The police were permitted to enter and secure the area because of the exigent circumstances of imminent destruction of evidence. MCL 750.81 et seq is constitutional and a proper exercise of the legislative police powers to protect the police and society in general from harm and injury.

RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellee, The People of the State of Michigan respectfully request that the decision of the Court of Appeals be AFFIRMED and the matter be remanded to the trial court for further proceedings.

Respectfully submitted,

Date: March 30, 2021

Gregory J. Babbitt, P31863
Assistant Prosecuting Attorney
Chief Appeals Attorney
Ottawa County, Michigan